

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO  
DISMISS CHARGE 1 FOR  
FAILURE TO STATE AN  
OFFENSE TRIABLE BY  
MILITARY COMMISSION**

**4 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of Charge 1 because it fails to state an offense triable by military commission, and offers in support of this motion:

1. **Synopsis:** Charge 1, “conspiracy,” is not a not an offense within the jurisdiction of this military commission. In fact, “conspiracy” is not a valid offense under the law of war or international criminal law.

2. **Facts:** The question posed is a pure question of law under the law of war.

**3. Discussion:**

Charge 1 is based on the charge of “conspiracy” contained within Military Commission Instruction No. 2 (MCI No. 2) para. 6C, entitled “Other Forms of Liability and Related Offenses.” Yet, the crime of conspiracy contained in MCI No. 2 does not exist in the law of war or international law.

There is no crime of “conspiracy” under the law of war. The government acknowledges this fact by not including “Conspiracy” in the list of offenses in MCI No. 2 para. 6A, entitled “Substantive Offenses—War Crimes.” Moreover, under international law, there is no crime of conspiracy at all except in the context of genocide.<sup>1</sup>

The offense of conspiracy is a “common law,” crime, and is used primarily in “common law” countries, which include the U.S. and Great Britain. In common law countries, it is a crime--a “conspiracy”--for a person to enter into an agreement with another person to carry out a criminal act.<sup>2</sup> Countries that do not follow the common law tradition do not accept “conspiracy”

<sup>1</sup> In all of the international criminal law conventions of the last half century, the sole reference to conspiracy appears in connection to the international crime of genocide. The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, Article III (b), renders “conspiracy to commit genocide” punishable. Following the pattern of this convention, the other international instruments addressing conspiracy in the context of armed conflict do so only with regard to genocide. The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3) both criminalize conspiracy to commit genocide, using precisely the same language as the Genocide Convention. Indeed, the ICTR has issued numerous judgments related to the offense. It should be noted that the Statute of the International Criminal Court (1998) does not follow its *ad hoc* counterparts for the former Yugoslavia and Rwanda, as it makes no explicit reference to conspiracy.

<sup>2</sup> Conspiracy is an “inchoate” or “preliminary” crime. In these types of crimes, the actual substantive offense does not have to be completed for the perpetrator to be convicted. For example, the crime of conspiracy is committed if two persons enter into an agreement to kill a person next week even if it turns out that they cannot or do not

RE

Page 1 of 3

as an offense. In fact, domestic law in most nations criminalizes only complicity or participation in a crime that is actually committed or attempted.<sup>3</sup> International law, including the law of war, following the practice of most countries in the world, does not include common law conspiracy as a viable, cognizable theory of criminal liability.<sup>4</sup>

This commission may try Mr. Hicks only for violations of the law of war and other offenses Congress has authorized for trial by military commission. The only such offenses are Aiding the Enemy under UCMJ Art. 104, and Spies under UCMJ Art. 106. The offense of "conspiracy" as stated in MCI No. 2 para. 6C, is neither a law of war crime or other offense triable by military commission. Accordingly, Charge 1 fails to state an offense over which this commission has jurisdiction. As a result, Charge 1 must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

**5. Evidence:**

A: The testimony of expert witnesses.

B: Attachments

1. *Convention on the Prevention and Punishment of the Crime of Genocide*, Article III (b).
2. Statute of the International Tribunal for the Former Yugoslavia (1993), Article 4.3.
3. Statute of the International Tribunal for Rwanda (1994), Article 2.3.
4. Cassese, "International Criminal Law," 2003, p. 191.

**6. Relief Requested:** The defense requests Charge 1 be dismissed.

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accomplish the murder. It is the agreement to commit the murder, coupled with some overt act in furtherance of that illegal objective, that constitutes the criminal offense. Of course, if the conspirators completed the murder, they would be guilty of both murder and conspiracy to commit murder.

<sup>3</sup> In most countries it would not be a crime for two parties to enter into an agreement to kill another person. However, if person 1 gives person 2 a gun, knowing that person 2 is going to use that gun to kill person 3, and then person 2 actually uses the gun to kill person 3, person 1 would be guilty of murder for helping person 2 commit the murder.

<sup>4</sup> Cassese, "International Criminal Law," Oxford UP, 2003, p. 191. Shabas, "An Introduction to the International Criminal Court," 2<sup>nd</sup> ed., Cambridge UP, p. 103.

7. The defense requests oral argument on this motion.

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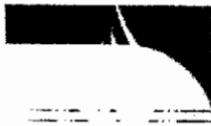
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Office of the High  
Commissioner for Human Rights

**Convention on the Prevention and Punishment of the Crime of Genocide**

**Approved and proposed for signature and ratification or accession by  
General Assembly resolution 260 A (III) of 9 December 1948**

**entry into force 12 January 1951, in accordance with article XIII**

**status of ratifications, reservations and declarations**

***The Contracting Parties,***

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

***Article 1***

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

***Article 2***

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Attachment 1 to RE \_\_\_\_\_

Page 1 of 2

**Article 3**

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d ) Attempt to commit genocide;
- (e) Complicity in genocide.

**Article 4**

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

**Article 5**

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

**Article 6**

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

**Article 7**

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

**Article 8**

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

**Article 9**

Disputes between the Contracting Parties relating to the interpretation, application or

Attachment 1 to RE \_\_\_\_\_  
Page 2 of 2

**STATUTE OF THE INTERNATIONAL TRIBUNAL  
(ADOPTED 25 MAY 1993)**

**CONTENTS**

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<u>Article 1</u>	Competence of the International Tribunal	<u>Article 18</u>	Investigation and preparation of indictment
<u>Article 2</u>	Grave breaches of the Geneva Conventions of 1949	<u>Article 19</u>	Review of the indictment
<u>Article 3</u>	Violations of the laws or customs of war	<u>Article 20</u>	Commencement and conduct of trial proceedings
<u>Article 4</u>	Genocide	<u>Article 21</u>	Rights of the accused
<u>Article 5</u>	Crimes against humanity	<u>Article 22</u>	Protection of victims and witnesses
<u>Article 6</u>	Personal jurisdiction	<u>Article 23</u>	Judgement
<u>Article 7</u>	Individual criminal responsibility	<u>Article 24</u>	Penalties
<u>Article 8</u>	Territorial and temporal jurisdiction	<u>Article 25</u>	Appellate proceedings
<u>Article 9</u>	Concurrent jurisdiction	<u>Article 26</u>	Review proceedings
<u>Article 10</u>	<i>Non-bis-in-idem</i>	<u>Article 27</u>	Enforcement of sentences
<u>Article 11</u>	Organization of the International Tribunal	<u>Article 28</u>	Pardon or commutation of sentences
<u>Article 12</u>	Composition of the Chambers	<u>Article 29</u>	Cooperation and judicial assistance
<u>Article 13</u>	Qualifications and election of judges	<u>Article 30</u>	The status, privileges and immunities of the International Tribunal
<u>Article 14</u>	Officers and members of the Chambers	<u>Article 31</u>	Seat of the International Tribunal
<u>Article 15</u>	Rules of procedure and evidence	<u>Article 32</u>	Expenses of the International Tribunal
<u>Article 16</u>	The Prosecutor	<u>Article 33</u>	Working languages
<u>Article 17</u>	The Registry	<u>Article 34</u>	Annual report

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Attachment 2 to RE \_\_\_\_\_

Page 1 of 2

Article 4  
**Genocide**

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Attachment 2 to RE \_\_\_\_\_

Page 2 of 2

UNITED NATIONS



NATIONS UNIES

## STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Article 1:	Competence of the International Tribunal for Rwanda
Article 2:	Genocide
Article 3:	Crimes against Humanity
Article 4:	Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II
Article 5:	Personal Jurisdiction
Article 6:	Individual Criminal Responsibility
Article 7:	Territorial and Temporal Jurisdiction
Article 8:	Concurrent Jurisdiction
Article 9:	Non Bis in Idem
Article 10:	Organization of the International Tribunal for Rwanda
Article 11:	Composition of the Chambers
Article 12:	Qualification and Election of Judges
Article 12 <i>bis</i> :	Election of Permanent Judges
Article 12 <i>ter</i> :	Election and Appointment of <i>Ad Litem</i> Judges
Article 12 <i>quater</i> :	Status of <i>Ad Litem</i> Judges
Article 13:	Officers and Members of the Chambers
Article 14:	Rules of Procedure and Evidence
Article 15:	The Prosecutor
Article 16:	The Registry
Article 17:	Investigation and Preparation of the Indictment
Article 18:	Review of the Indictment
Article 19:	Commencement and Conduct of Trial Proceedings

Attachment 3 to REPage 1 of 2

**Article 2: Genocide**

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) Genocide;
  - (b) Conspiracy to commit genocide;
  - (c) Direct and public incitement to commit genocide;
  - (d) Attempt to commit genocide;
  - (e) Complicity in genocide.

Attachment 3 to RE \_\_\_\_\_  
Page 2 of 2

OXFORD

# INTERNATIONAL CRIMINAL LAW



Antonio Cassese

perpetration follows, it is no longer punishable per se, as it is 'absorbed' into the actual crime (although it may be taken into account as an aggravating circumstance). This subcategory includes planning and ordering.

2. Criminal conduct that is preparatory to a crime, but which by definition cannot be followed by the intended crime. This subcategory encompasses attempt, where, by definition, the subsequent offence is not consummated (because subjective or external circumstances prevent consummation).

3. Criminal conduct that is punished per se, whether or not it is followed by the consummation of a crime; where a crime does follow, this conduct, as well as the consummated crime is punished. This subcategory includes incitement to commit genocide and conspiracy to genocide.

In many national legal systems (particularly in common law countries) three categories of such crimes are envisaged: attempt, conspiracy, and incitement. In international law, while attempt is regarded as admissible as a *general class* of inchoate crimes, conspiracy and incitement are only prohibited as 'preliminary' (not consummated) offences when connected to the most serious crime, genocide. The very limited acceptance of conspiracy is probably due to the fact that this class of criminal offence is not accepted in most civil law countries; hence it has been considered admissible at the international level only with regard to the most heinous and dangerous crime. Indeed, genocide is a crime that by definition attacks individuals qua members of a group and with a view to destroying the group as such.

As for incitement, as we have seen above, in international criminal law it is prohibited only if it leads to the actual perpetration of the crime, that is, as a form of participation in a crime, probably because States and courts have felt that prohibiting incitement per se in connection with *any* international crime including war crimes and crimes against humanity would excessively broaden the range of criminal conduct, the more so because of the difficulty of clearly delineating the notion of incitement. Incitement as such has been exceptionally prohibited, subject however to some stringent conditions, in connection, again, with the most harmful and serious international crime, genocide.

As for planning and ordering, the rationale behind the tendency of international law to punish them as inchoate crimes lies primarily in this: the most serious and large-scale international crimes result from careful preparation and concerted action by many agents, or are the result of instructions and directives issued by military or political leaders. In consequence, international criminal rules aim to prevent or at least circumscribe such conduct by stigmatizing it as criminal and making it penally punishable.